

Defendant.

1 individual property rights, even when identifiable competing interest groups participate, and the  
2 process becomes contentious.

3 Here, only the City Council in its legislative function can make the policy decision to  
4 extend historic district boundaries *see* City Motion at pages 11-17; City Response at 5-14. Plaintiff  
5 presents no evidence that prior historic district boundary changes were reviewed as quasi-judicial  
6 decisions. The two prior amendments to the Historical District were legislative. *See* Decl. Mitchell,  
7 Ex. 12-13.

8 The Ordinance is not a quasi-judicial rezone because in Washington’s post-1995 land use  
9 framework, an application is a prerequisite to a quasi-judicial rezone process. The application  
10 triggers permit review under the Local Project Review Act, the only path to a quasi-judicial  
11 “contested case hearing” pursuant to RCW 42.36.010. Plaintiff filed no rezone application.

12 Plaintiff’s assertion that CB 119330 was an application for a rezone has no merit. *Pl. Opp.*  
13 at 5:15-17. Plaintiff relies on the lead *Schnitzer* opinion, which this Court in its October 19 Order  
14 correctly recognized as nonbinding and incorrect. *Schnitzer* is distinguishable in any event. Unlike  
15 the local action in *Schnitzer*, CB 119330 does not qualify as a rezone application under the City’s  
16 code because only property owners or their agents may apply for a quasi-judicial rezone, *see* SMC  
17 23.76.040.A.2, and began as a broader legislative proposal that cannot be transformed mid-  
18 process. *See* City’s Motion at 15:3-18.

19 Besides, the Ordinance is not a zoning action, nor an unlawful spot zone, because it does  
20 not amend the Official Land Use Map or the property’s underlying zoning classification. *See* City’s  
21 Response, pages 6-10.

22 Plaintiff wrongly asserts and misapplies Seattle Municipal Code sections. *Pl. Opp.* at 5:10-  
23 16. A “rezone” is defined in SMC 23.84A.032”R” to mean an amendment to the Official Land Use

1 Map to change the zone classification of an area. Only a property owner or owner's agent can  
2 make a Type IV rezone application, *See* SMC 23.76.040.A.2. Such a rezone application is  
3 processed as a decision to amend the Official Land Use Map. *See* SMC 23.76.036.A.1. A rezone  
4 application may involve a change in an overlay district if the overlay district is one that is  
5 "regulated in Part 3" of Title 23 and "established" on the Official Land Use Map. *See* SMC  
6 23.32.010; *See* also SMC 23.34.002. Downtown zones are designated in SMC 23.34.100 - .128.  
7 Plaintiff mistakenly asserts that the Ordinance automatically rezoned the Showbox site. Plaintiff  
8 is wrong. Even if the Showbox site meets the criteria of SMC 23.34.122 despite arguably not being  
9 "encompassed by the adopted Pike Place Project Urban Renewal Plan inclusive of the Pike Place  
10 Historic District," that is immaterial because the Ordinance does not amend the Official Land Use  
11 Map or rezone the property, even if it should have.

12 Moreover, the mere fact that CB 119330 was amended during its policy review is indicative  
13 of legislation. A permit application cannot be unilaterally amended by the reviewing agency during  
14 permit review. In quasi-judicial decision-making, decisions are made "pursuant to existing  
15 legislative standards," whereas the purpose behind legislative actions is to amend the legislative  
16 standards. SMC 23.76.004.C.

17 Plaintiff presents no evidence that: the Council failed to follow RCW 36.70A.390's  
18 procedures; case law requires additional notice beyond what RCW 36.70A.390 requires; or RCW  
19 36.70A.390 applies only to area-wide amendments. *Pl. Opp.* at 7:15-16. The law imposes no area-  
20 wide requirement. RCW 36.70A.390 applies to "the controls placed on development or land use  
21 activities" so long as it is not a "decision to approve a project permit application." *See* RCW  
22 36.70A.030(7). Nor was the City limited to using RCW 36.70A.390 in the most onerous way by  
23 applying a moratorium on all development downtown near the Market.

1 If the Court agrees that the Council should have processed the Ordinance as a quasi-judicial  
2 decision, then the proper remedy is to invalidate the Ordinance for lack of procedural due process.  
3 If the Court agrees that the Ordinance was a legislative action enacted in accordance with RCW  
4 36.70A.390, then the procedural claims fail.

5 **B. Substantive Claims.**

6 Plaintiff's substantive challenges fail because the Ordinance meets the rational basis test –  
7 the Ordinance properly calls for a “time-out” to further the *status quo* on the ground allowing time  
8 for a study to determine whether to amend existing regulations to address an unexpected threat to  
9 the historical and cultural value of the Pike Place Market neighborhood.. The Ordinance is justified  
10 in imposing interim controls only on the Showbox because it is adjacent to the Historical District  
11 and uniquely threatened by redevelopment. No other similarly situated property faces the same  
12 threat of redevelopment as the Showbox. Other music venues across town are not similarly situated  
13 adjacent to the Historical District, and properties already included within the Historical District  
14 nearly 50 years ago are not threatened.

15 The City's Response countered much of the mischaracterization of federal and Washington  
16 substantive due process law Plaintiff offers in response to the City's cross-motion. *Compare* City's  
17 Response at 15-18 *with* Pl.'s Opp. at 10-13. The City relies on that response, supplemented by a  
18 few points.

19 Notwithstanding Plaintiff's assertions to the contrary, *see* PL's Opp. at 12-13 (citing *Lingle*  
20 *v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005)) *Lingle* was a takings case that ejected  
21 “substantially advances” from the takings analysis and also recognized the standard has no place  
22 even in federal substantive due process law: “We find the proceedings below remarkable, to say  
23 the least, given that we have long eschewed such heightened scrutiny when addressing substantive

1 due process challenges to government regulation.” *Lingle*, 544 U.S. at 544-45 (citing two “rational  
2 basis” decisions). *See id.* at 540-45.

3 Plaintiff cites no decision holding or suggesting “rational basis” applies in some situations  
4 and “undue oppression” in others. None exists. Plaintiff just insists without support that every  
5 property interest is fundamental and subject to the “undue oppression” analysis, not either of the  
6 two analyses used by federal courts: strict scrutiny or “rational basis.” Lower federal courts and  
7 Washington courts hold that laws affecting only property or economic interests implicate no  
8 fundamental right. *E.g.*, *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012);  
9 *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 720-21, 399 P.3d 562 (2017), *rev.*  
10 *denied*, 189 Wn.2d 1040, 409 P.3d 1066, *cert. denied*, 139 S. Ct. 81 (2018).

11 Plaintiff gains nothing from Washington decisions recognizing certain “fundamental  
12 attributes of property ownership” within the meaning of regulatory takings law. *See* Pl.’s Opp. at  
13 10-11 (citing *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 363-65, 13 P.3d  
14 183 (2000), and *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993)). Even the most  
15 fundamental property right is still just a property right lacking “fundamental” status within the  
16 meaning of substantive due process law. Plaintiff likewise finds no support in a Washington  
17 decision recognizing “those fundamental rights which belong to the citizens of the state by reason  
18 of such citizenship” within the meaning of Washington’s privileges and immunities law under  
19 Wash. Const. art. I, § 12—that decision fails to convey “fundamental” status under substantive  
20 due process law. *See id.* at 10 (citing *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

21 *Parkridge*, *Woodcrest*, and *Bassani* have no place in Washington’s post-1995 zoning laws.  
22 Pl. Opp. at 21:12-22. A change of conditions is taken into account only under the direction of local  
23 code. In Seattle, SMC 23.34.007.G provides that “[E]vidence of changed circumstances shall be

1 taken into consideration in reviewing proposed rezones, but is not required to demonstrate the  
2 appropriateness of a proposed rezone. Now, the burden is on opponents of a quasi-judicial rezone  
3 or a legislative rezone, as provided in RCW 36.70C.130 and RCW 36.70A.320, respectively.  
4 Plaintiff offers no evidence that the Ordinance was not justified by City planning policies.

5 In the City's Motion at 20-21, the City argues that the Ordinance amended Historical  
6 District development regulations. The Growth Management Hearings Board would have exclusive  
7 jurisdiction over a challenge that such regulations are inconsistent with the City's comprehensive  
8 plan. Because Plaintiff must prove a spot zone unlawful by proving its inconsistency with City's  
9 comprehensive plan, that fight would have to start before the Board, not this Court.

10 After discovery, Plaintiff presents no evidence to support its assertion that the Ordinance  
11 compels speech; the Ordinance affects Plaintiff's lease with AEG; or the District guidelines  
12 compel any action or speech by the Plaintiff even if it broke its lease early during the Ordinance's  
13 short life.

#### 14 **C. Declarations.**

15 Paragraphs from *Whitson Decl.* and Ex. 2 from *Sodt Decl.* are not hearsay because they are  
16 not used to prove the truth of the matter asserted. *Pl. Opp.* at 2:15-25 and 3:1-22. The basic history  
17 of the Showbox is not in dispute: it opened as a market (1917), converted to a theater (1939), and  
18 hosted numerous performances.

19 Paragraph 17 of the *Whitson Decl.* is not a legal conclusion. Whitson is in a position to  
20 factually state that to accomplish a rezone, an ordinance must include ordaining language that  
21 rezones the property and amends the Official Land Use Map, and attach a rezone map as an exhibit  
22 to reflect the rezone. The Ordinance did not do so. *See Decl. Mitchell*, ex. 9 and 10 (examples of  
23 ordinances that accomplish rezones). Rezones do not occur "automatically." *Pl. Opp.* at 3:18-22.

1 It may be that Plaintiff's property meets criteria in SMC 23.34.122, but that is immaterial because  
2 the Ordinance did not rezone Plaintiff's property, even if it should have.

## 3 II. CONCLUSION

4 This Court should dismiss Plaintiff's procedural and substantive claims and uphold  
5 Ordinance 125650 because the Ordinance's enactment was legislative and proceeded properly  
6 under GMAs authority to expeditiously adopt temporary interim controls. The City's action is  
7 supported by a rational basis that defeats all the substantive claims.

8 *I certify that MS Word 2016 calculates all portions of this memorandum required by the*  
9 *Local Civil Rules to be counted contain 1729 words, which complies with the Local Civil Rules.*

10 Respectfully submitted June 17, 2019.

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**CERTIFICATE OF SERVICE**

I certify that, on this date, I electronically filed a copy of this document, City of Seattle's Reply and the City's Local Civil Rule 7(b)(7) affidavit with the Clerk of the Court using the ECR system.

I also certify that, on this date, I sent a courtesy copy of those documents by email to:

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DATED June 17, 2019.

s/Alicia Reise  
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